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# In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 390

N. J. ALLBAUGH, ALSO KNOWN AS NORMAN J. ALLBAUGH, FRANK VESELY, W. E. ALLBAUGH, ALSO KNOWN AS WILBER ALLBAUGH, FRANK J. VESELY, ALSO KNOWN AS F. J. VESELY, AND REUBEN VESELY, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the district court (R. 102–117), including its findings of fact and conclusions of law, is reported at 83 F. Supp. 109. The opinion of the court of appeals (R. 136–150) is reported at 184 F. 2d 109.

### JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on August 9, 1950

(R. 150–151). The petiton for a writ of certiorari was filed on October 30, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1254 (1).

**QUESTIONS PRESENTED**

1. Whether the lease contracts here involved, requiring payment of a stipuated amount "plus taxes * * * as rental" for certain Indian lands, contemplated that the Nebraska taxes assessed on such lands pursuant to the Brown-Stephens Act should be paid by the lessee as part of the rent.

2. Whether the United States could properly maintain this action, on behalf of the Indians, to recover the unpaid rent, measured by the amount of taxes, without the taxes having been first paid.

3. Whether the administrative procedure provided in the Brown-Stephens Act for the collection of State taxes upon Indian allotments prevents recovery in this suit on the lease contracts.

4. Whether petitioners have any standing to challenge the constitutionality of the Brown-Stephens Act, and, if so, whether Congress may subject the trust allotments to State taxation, at least after the expiration of the original trust period.

**STATUTE INVOLVED**

The Brown-Stephens Act of December 30, 1916, 39 Stat. 865, provides:

> That all of the lands in the State of Nebraska belonging to the members of the

tribe of Winnebago Indians held under trust patents of allotments, and upon which the twenty-five-year trust period shall have expired, or shall expire, and which trust period shall have been or shall be extended as provided by law, shall be, and the same are hereby, made subject to appraisement and assessment for the purposes of taxation and subject to taxation for local, school district, road district, county and State purposes, as provided by the laws of the State of Nebraska now in force or to be hereafter enacted.

SEC. 2. That all of the lands in the State of Nebraska belonging to the members of the tribe of Omaha Indians now held under trust patents of allotments issued in eighteen hundred and eighty-five or subsequent thereto, and upon which the twenty-five-year trust period shall have expired, and which trust period shall have been extended, as provided by law, shall be, and the same are hereby, made subject to appraisement and assessment for the purposes of taxation and subject to taxation for local, school district, road district, county, and State purposes, as provided by the laws of the State of Nebraska now in force or to be hereafter enacted: *Provided,* That any of the lands described in section one and section two of this Act, so long as the same shall be held under trust patents, shall not be subject to levy and tax sale, as provided under the laws of the State of Nebraska for the collection of

such taxes; but if such tax shall not be paid within one year after the same shall become due and payable, as provided by the laws of the State of Nebraska, then the list of such unpaid and delinquent taxes on the lands of the Winnebago Indians and Omaha Indians, as above provided, shall be certified by the county treasurer of the county in which such lands are situated to the Secretary of the Interior, who shall be authorized to pay the same from any funds belonging to the Indian allottees owning such lands so taxed and arising from the rentals thereof or under his control; and in the event that no such funds shall be in the possession or under the control of the Secretary of the Interior, he shall certify that fact to the said county treasurer, which certificate shall operate as a full release and discharge of the tax assessed against the land of the Indian so without funds.

**STATEMENT**

This is an action brought by the United States on behalf of the Indian owners of restricted trust patent allotments to recover from the lessee of such allotments and his bondsmen the unpaid balance of rentals for the years 1934 to 1942, inclusive, said unpaid balance being represented by real-estate taxes which the lessee had agreed to pay as part of the consideration for his use of the properties (R. 1–20). It is one of the 107 similar

actions filed in October of 1946 in the district court (R. 102). It has been stipulated that the decision in the instant case should govern in the others (R. 77–80, 102–103). The historical background leading to the institution of the suits may be summarized as follows:

The lands involved in all of the cases are located in Thurston County, Nebraska, and were at one time part of the reservation established for the Omaha and Winnebago tribes of Indians (R. 1, 103). They were allotted in severalty to various members of the tribes pursuant to the General Allotment Act of February 8, 1887, 25 U. S. C. 331, *et seq.,* and similar statutes (R. 1, 103), the allotments having been made at various times from 1884 to 1905. H. Rep. No. 1098, 64th Cong., 1st sess., p. 2. The Indians were given trust patents which declared that the United States would hold the allotments in trust for the respective Indians for a period of 25 years, and that at the end of said trust period the United States would convey the allotments to the Indians entitled thereto in fee, discharged of the trust and free of all charge or incumbrance whatsoever (R. 1, 103). Although no express provision was made as to taxes, it has been held that such allotments were exempt from local taxation during the trust period. *United States* v. *Rickert,* 188 U. S. 432, 437–438; *United States* v. *Board of Comm'rs of Fremont County, Wyo.,* 145 F. 2d 329, 331 (C. A.

10), certiorari denied, 323 U. S. 804. The 25-year trust period was capable of being extended, and with respect to all the lands involved in the 107 actions has in fact been extended so that the allotments are presently held under trust patents (R. 24, 103).

With the completion of the allotment program, the nontaxable allotments comprised approximately 91 percent of the area of Thurston County, so that a very heavy burden was placed upon the white residents for maintenance of local government, and the development of the county was greatly retarded. H. Rep. No. 1098, 64th Cong., 1st sess., p. 3; S. Rep. No. 397, 61st Cong., 2d sess., pp. 1–2. Therefore, by the Act of May 6, 1910, 36 Stat. 348, Congress consented to the local taxation of the lands of Omaha tribe members held under trust patents issued prior to 1885, it being considered that "the increase in the value of the Indian lands themselves, growing out of better roads, better schools, and more effective administration of local affairs, which would be made possible by the larger income to the county, will very much more than equal the sum total of taxes which will be paid by the Indians." S. Rep. No. 397, 61st Cong., 2d sess., p. 3. However, in order to insure that the allotments would be preserved for the Indians the consent to their taxation was limited by the provision that the trust allotments should not be subject to sale for unpaid taxes.

In lieu of such tax sales, it was provided that the county treasurer should certify a list of all such unpaid taxes, delinquent for more than a year, to the Secretary of the Interior, who was authorized to make payment from any funds in his control belonging to the respective Indian allottees and arising from rental of the lands. If no such funds were available, on certification of such fact by the Secretary to the county treasurer, the taxes assessed were to be treated as released and discharged.

By the 1910 Act and the issuance of fee patents to some of the Indians, the financial condition of Thurston County was somewhat improved, and in 1916 approximately half of the county's area was subject to taxation. H. Rep. No. 1098, 64th Cong., 1st sess., p. 3. At this time, by the Brown-Stephens Act of December 30, 1916, 39 Stat. 865 (*supra*, pp. 2–4), Congress consented, on the same conditions and limitations set out in the ~~1910~~ 1916 Act, that, upon the expirations of the 25-year trust periods, the allotments of the Winnebago Indians and of the Omaha Indians not covered by the 1910 Act should be subject to taxation.

Pursuant to the authority granted by the Act of March 3, 1921, 41 Stat. 1225, 1232, 25 U. S. C. sec. 393, the Indians have for some time leased their restricted allotments for agricultural purposes, the leases being made under rules and regulations prescribed by the Secretary of the

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Interior and subject to approval by the superintendent of the local Indian agency (R. 1, 29, 103). Prior to 1933, it was the practice to lease the lands to the highest acceptable bidders who met the advertised rental appraisals per acre, which included an amount for taxes (R. 71, 103–104, 129). According to the advertisements, the lessees were required to pay the taxes directly to the county treasurer and to file the tax receipts in the agency office, where credit on the rentals would be given for the tax payments (R. 71, 104). In 1933, the practice of fixing a minimum rental value was discontinued, and the leasing advertisements provided that bids would be received for cash, or bushel per acre, plus taxes, and that the taxes should be paid to the county treasurer, with the tax receipts being filed in the agency office (R. 73, 75, 104, 129–130). According to the leasing advertisements, under both systems, the present lessee, if a satisfactory tenant, was to be given a preference in that he would be permitted to meet the highest bid (R. 71, 73, 75, 104, 129–130), and for the lease year 1941, and perhaps for other years, it was expressly provided that lessees whose rentals were delinquent would not be entitled to preference rights (R. 75, 104). The leases themselves were executed on printed forms, the form, although modified from time to time, being substantially the same from 1934 to 1942 (R. 29, 35, 39, 45, 49, 53, 59, 65, 69, 105). The

form used during most of the period involved provided as follows, the blanks in the form being indicated by parentheses:

> The lessee, in consideration of the foregoing, covenants and agrees to pay ($3.00 plus taxes) per acre per year to the (Superintendent, Winnebago Indian Agency) as rental for said land and premises, in (semi-annual) payments on (March 1st and September 1st) of each year during the lease. All rentals not paid when due will draw (6 or 7) percent interest from that date.
>
> The lessee agrees to pay all taxes assessed against the land during the term of the lease promptly when due, and to send the receipts therefor to the Superintendent, who will credit the amount on the rental, the balance to be paid as specified above [See R. 53].

Although the lessees generally paid the specific sums of cash rent, they did not in many instances pay the taxes (R. 25, 77–78, 108). Neither were the taxes paid by the Indians or anyone on their behalf (R. 25, 108). The county treasurer did not certify to the Secretary of the Interior a list of unpaid taxes on the leased allotments, as provided in the Brown-Stephens Act, and, of course, the Secretary has not certified to the treasurer that there were no funds of the allottees available to make the tax payments (R. 26, 108). The

balance of the rentals represented by the unpaid taxes having become a sizable figure,[1] the United States, on behalf of the restricted Indians, brought suits against 107 lessees and their bondsmen to recover the unpaid rentals.

In this case, the complaint (R. 1–20) contains nine causes of action, each based upon a separate lease of Indian lands made by N. J. Allbaugh and each asserting a claim for unpaid rental in the amount of the taxes (see R. 1–3). In their answer, petitioners, the lessee and his bondsmen, admitted the nonpayment of taxes and set up four defenses: (1) that the lessee has paid all rents due to the Indians under the leases, (2) that the United States was not the proper party to prosecute an action to recover unpaid taxes, (3) that the remedy prescribed by the Brown-Stephens Act for the collection of the taxes was exclusive, and (4) that the Brown-Stephens Act was unconstitutional (R. 20–23).

The case was tried on the pleadings and a stipulation of facts (R. 103, 119). And, on March 4, 1949, the district court filed a memorandum (including findings of fact and conclusions of law) (R. 102–119) and its judgment (R. 119–125), holding for the United States on every claim

[1] It is estimated that the total amount involved in the 107 actions which were brought only against lessees whose delinquencies were $200 or more, is approximately $150,000, exclusive of interest.

with the exception of the two instances (cause of action No. 1 and one year's taxes in cause of action No. 3) in which it was found that there had been a full settlement under modification agreements (R. 119–120, see R. 31, 41, 106–107). The district court reasoned that, since the leases contemplated the payment of taxes as part of the rent and since, therefore, the purpose of the suit was to recover unpaid rent, not to enforce a covenant to pay taxes, there could be no serious question that the United States could properly maintain the action on behalf of its Indian wards, without the taxes having first been paid (R. 109–114). It also rejected petitioners' defense that the Brown-Stephens Act provided the exclusive method for collecting taxes (R. 114), and held that petitioners had no standing to challenge the constitutionality of the Act (R. 114–116). On appeal, the court below affirmed the decision and reasoning of the district court (R. 137–151),[2] and modified the judgment to provide that Thurston County might make application for distribution of any funds paid into court in satisfaction of the judgment (R. 148–151).

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[2] Since the court below found that the taxes were to be paid as a part of the rent (R. 140–144), it apparently did not find it necessary to enter into a separate discussion of petitioners' "real party in interest" defense (see R. 139–140).

ARGUMENT

1. After careful consideration of all of petitioners' contentions to the contrary, both of the courts below have found that the leases contemplated the payment of taxes as part of the rent (R. 106, 111–114, 140–144). Such a finding is required by the plain and unambiguous language that the lessee was to pay a specified amount of cash plus the taxes "as rental" (R. 35, 39, 45, 49, 53, 59, 65, 69). Although this finding of the two courts below is alleged to be erroneous (Pet. 8), the bare assertion is not supported by any substantial argument (compare Pet. 21–23 with R. 141–142). Since the taxes were to be paid as part of the rent, it follows that the suit is not, as petitioners would have it, an action for breach of covenant to pay taxes, but is nothing more than an action in debt to recover unpaid rent, measured, it is true, by the amount of taxes, but nevertheless rent. The complaint was so drafted (R. 2–3), and was so considered by the courts below (R. 109, 112–114, 137, 140–141).

In this posture of the case, which petitioners choose to ignore, it is apparent that there can be no basis for petitioners' contention (Pet. 14–21) that the United States was not the proper party to maintain the action. Obviously, in a suit to recover unpaid rent, the Indian lessors are the real parties in interest within the meaning of Rule 17 (a) of the Federal Rules of Civil Pro-

cedure and, as petitioners concede (Pet. 17), the United States as trustee may in such a case maintain an action on behalf of its Indian wards even though the United States will not receive monetary benefit by the judgment. *Heckman* v. *United States,* 224 U. S. 413, 437–444. In such a suit, it is, of course, unnecessary to show any damage other than that rent is unpaid (see Pet. 18, 23–25). Petitioners cannot defend against enforcement of their contract obligations on the ground that Thurston County is an incidental beneficiary in that the rent recovered might be used to pay taxes.[3]

2. Petitioners' other contentions are likewise without merit. Inasmuch as this is a suit to recover unpaid rent, the fact that the Brown-Stephens Act prescribed an exclusive remedy for the

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[3] The fact that the court below modified the judgment to provide that Thurston County might apply for disbursement of the funds paid into court in satisfaction of the judgment (R. 148–151; see Pet. 5, 18) can have no effect in this respect. This modification merely pointed the way for an ancillary proceeding, in which petitioners are in no way concerned, for the distribution of trust funds in the custody of the court. Cf. *Oliver* v. *United States*, 156 F. 2d 281 (C. A. 8). Obviously, there can be no implication therefrom that the County, rather than the Indians, was the real party in interest in the main suit for the recovery of rent. And it is plain that, if there is any irregularity in the procedure (see Pet. 5, 18), petitioners, not being prejudiced thereby, have no standing to complain.

Finally, it is to be noted that Congress has found it to be in the Indians' interest that the taxes be paid. See *supra*, p. 6.

collection of taxes (see Pet. 25–28) is of no consequence here. The Act cannot be deemed in any way to have limited the remedies of the Indian allottees for breach of contract. Obviously, as the courts below held (R. 114, 144), the principle relied upon can have possible application only in a suit by Thurston County to recover taxes as such.

It is also plain that, as the Court of Appeals held (R. 147–148), petitioners are in no position to question the validity of the Brown-Stephens Act (cf. *Massachusetts* v. *Mellon,* 262 U. S. 447, 488) and petitioners do not apparently challenge this holding (Cf. Pet. 28, 31). Moreover, whether or not the Act was valid, the Indian lessors could voluntarily elect to pay the taxes. *Mahnomen County* v. *United States,* 319 U. S. 474, 477. And by their lease contracts they have displayed a clear consent and even a desire that the taxes be paid. It is these same lease contracts, not the tax statute, which gives rise to petitioners' obligations.

Finally, if the question should be reached, we submit that the Brown-Stephens Act is clearly valid. The Indians here involved did not have a vested right to a tax exemption. See *Mahnomen County* v. *United States,* 319 U. S. 474, 476; *Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598, 602; *Oklahoma Tax Comm'n* v. *Texas Co.,* 336 U. S. 342. Rather, the freedom of their lands from taxation depended solely upon the interest

of the United States therein. *United States* v. *Rickert,* 188 U. S. 432, 437–439. And, just as in the case of other Government instrumentalities, Congress could subject the allotments to local taxation. *Mayo* v. *United States,* 319 U. S. 441, 448; *Shaw* v. *Oil Corp'n,* 276 U. S. 575, 578–579; *United States* v. *Board of Com'rs of Fremont County, Wyo.,* 145 F. 2d 329, 331 (C. A. 10), certiorari denied, 323 U. S. 804. At least, there can be no question of this congressional power in imposing such a condition for an extension of the trust period. *United States* v. *Hester,* 137 F. 2d 145, 147 (C. A. 10), dealing with the same allotments involved in *Choate* v. *Trapp,* 224 U. S. 665; *United States* v. *Spaeth,* 24 F. Supp. 465 (D. Minn.); cf. *United States* v. *Waller,* 243 U. S. 452, 459–460.

## CONCLUSION

The decision of the court below is clearly correct, does not involve any conflict, and does not warrant review by this Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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